1990

Pacific Chromalox Division Emerson Electric Company v. Richard f. Irey and Industrial Engineering and Manufacturing Corporation and John Does I-V : Petition for Writ of Certiorari

Utah Supreme Court

E.H. Frankhauser; attorney for respondent.
Timothy W. Blackburn; Van Cott, Bagley, Cornwall & McCarthy; attorney for petitioner.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

PACIFIC CHROMALOX DIVISION, EMERSON ELECTRIC COMPANY, Petitioner, vs. RICHARD F. IREY and INDUSTRIAL ENGINEERING and MANUFACTURING CORPORATION and JOHN DOES I-V, Respondent.	PETITION FOR WRIT OF CERTIORARI Supreme Court No. 900168 Court of Appeals No. 880203CA Argument Priority Classification No. 13

Petition for Writ of Certiorari for review of decision by Court of Appeals affirming the desicion of the Second Judicial District Court of Weber County, State of Utah from the Honorable John F. Wahlquist, District Court Judge.

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THE QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the Court of Appeals erred in affirming the decision of the Second Judicial District Court of Weber County finding that the Petitioner is not a member of the legistlatively protected class under the relevent provisions of the Engineer's and Surveyors' Licensing Act. Utah Code Annotated Section 58-22-1 to 25 (1963) allowing Respondents to recover for breach of contract.

REFERENCE TO THE OFFICIAL REPORTS OF OPINION ISSUED BY THE COURT OF APPEALS

The Court of Appeals opinion of February 12, 1990, may be found in 128 Utah Adv. Rep. 8.

JURISDICTION OF THIS COURT

The Court of Appeals opinion of February 12, 1990, pursuant to Utah Code Annotated Section 78-2-2 (5) (1986), is reviewable as matter of discretion by a Petition for Writ of Certiorari. The Supreme Court of the State of Utah granted Petitioner's Exparte Motion for an Extension of Time to File for Writ of Certiorari to and including April 13, 1990, which Order was signed on March 14, 1990.

CONTROLLING STATUTES

Utah Code Annotated Title 58, Chapter 22, Sections 2 and 20 (1953, as amended) set out verbatim in Appendix A.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This Petition involves the review of the opinion of the Court of Appeals affirming the decision of the District Court in finding that Petitoner was not a member of the legislatively protected class under the Engineer's and Surveyors' Licensing Act., Utah Code Annotated Section 58-22-1 to -25 (1963) allowing Respondents to recover for breach of contract.

This action was brought by the Petitioner against the

Respondent Corporation and Irey for breach of contract and breach of warranty for Respondent's manufacturing for the petitioner, an automatic terminal bolt-to-coil assembly machine under specific specifications. (R. 1-4, 122-128).

Respondent Corporation counterclaimed for damages for beach of contract and unjust enrichment. (R. 108-118).

Petitioner further claimed as an affirmative defense, that Respondent Corporation acted through its only employee, Respondent Irey, who was not a licensed engineer and therefore unable to maintain an action. (R. 120 and 121).

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Trial of this action was to a jury who awarded the Respondent Corporation damages against the Petitioner in the amount of $92,500.00 together with accrued interest of $23,895.81, and costs of $285.45. (R. 323, 324 and 325).

Prior to trial, Petitioner moved for Dismissal of Respondent's Counterclaim pursuant to a Motion for Summary Judgment based upon the fact that Respondent Irey, d/b/a the Respondent Corporation, was not a licensed engineer. (R. 129 through 139, 141 through 153).

The Motion was heard before the Honorable David E. Roth and the Motion denied pending evidence to be submitted at trial concerning material issues of fact. (R. 168 and 169) (Reporter's Transcript p. 6) (See Appendix C).

The Motion was renewed at the time of trial before the Honorable John F. Wahquist and denied as having been decided by the other District Court Judge, the Honorable David E. Roth. (Reporter's Transcript p. 3 through 7, 16 through 19) (See Appendix C).

The Court of Appeals affirmed the District Courts ruling that denied the Petitioner protection under the Engineer's and Surveyors' Licensing Act.

C. RELEVANT FACTS TO THE ISSUE PRESENTED

On or about November 2, 1982, Industrial Engineering and Manufacturing Corporation, of which the Respondent Irey was the president and owner, agreed to manufacture for Appellant an automatic terminal bolt-to-coil assembly machine under specific specifications. (R. 1, 2, 122, 123). The machine was to be capable of applying a stud to both ends of various diameter coils at a minimum rate of 600 coils per hour or as later modified to 400 coils per hour. (R. 34).

At the time of entering into the contract to manufacture the assembly machine, the Respondent Irey was not licensed to practice engineering in the State of Utah. (R. 130).

That Respondent Irey has no license to practice his claimed profession of engineering, no college degree, no formal education in engineering. (R. 130).

Respondent Corporation had Joseph W. Lindsey, a self employed licensed engineer, review some aspects of previous designs completed by the Respondent Irey. (R. 145) (Reporter's

Transcript of Joseph W. Lindsey p. 2,7 and 24 affiliation with the Respondent Corporation, Respondent Irey, and the project to manufacture the assembly machine can be found in his testimony at trial. (See Appendix B, Reporter's Transcript of Joseph Lindsey p. 24, 15 and 29). Please note the following testimony:

Q. If the machine wasn't working properly, then you consider yourself responsible for that machine, Mr. Lindsey?

A. I did not consider myself responsible for whether or not the machine works. Again, as I explained to you in deposition and today, that is not a part of the certification. Certification only certifies to the strengths, to the proper choice of materials, the proper methods--

Q. You've made no certifications to this machine by any certified drawings, have you?

A. I have not stamped any drawings. I-- not certified in that sense.

Q. You have not --

A. But my approval is the same thing.

Q. You have not made any drawings on this particular machine, isn't that true?

A. I don't ordinarily do drafting, no.

Q. Isn't it true that Mr. Irey would design it, then bring it to you for your review of the items that were -- you've talked about?

A. That's correct in most cases. That I would review a design that was already done. And suggest whatever modifications that I felt were required to make better use of materials or to strengthen a part of required -- in that capacity.

Q. Now, initially he came to you and you went with a chalk board talk on the machine, I guess, is that correct?

A. That's correct.

Q. That was for design of the frame?

A. He initially came to me with the entire concept. We broke it down into various functions, looked at modules that would be required to accomplish it.

Q. Was that initially on the blackboard is how you did that?

A. Yes.

Q. In that review procession -- or that process, was anything designed I guess by Mr. Irey and you reviewed it after that process.

A. Oh, I'm sure there were a lot of cases where he made the suggestion and some where I made the suggestion, I'm sure that's possible, yes.

Q. As I understand, you're not an employee of Industrial Engineering and Manufacturing?

A. That's correct.

Q. You're not an officer of Industrial Engineering and Manufacturing?

A. That's correct.

Q. Did you ever meet with anybody at Pacific Chromalox concerning the machine?

A. No, I did not.

Q. So as to different gauge coils, different size diameters, different lengths, you performed no projection test with those other than the ones you observed him having in the shop which are the -- I guess the 25, 24 26 area?

A. I never conductd any tests with the machine.

Q. Maybe I asked you this, I apologize, did you make any drawings or designs at all for the machine?

A. Not directly, no.

The foregoing was direct testimony from Joseph W. Lindsey.

That in excess of a year following the entering into the agreement by the parties, Respondent Corporation and Irey delivered to Petitioner the assembly machine which had been manufactured. (R. 2, 123).

That the assembly machine did not fulfill the requirements set forth in the contract specification and did not operate properly. (R. 2, 123). The machine never produced

600 coils per hour or as later modified, 400 coils per hour and was always jamming. (R. 46 through 54). Mr. Lindsey only timed the seconds per cycle to produce a coil at 7.14 seconds. Mr. Lindsey then stated that is about 505 parts per hour. However, Mr. Lindsey never tested the machine on a continous basis and never saw more than 20 to 30 coils run at a time. Mr. Lindsey testified that in 1984 the machine was operating down around 200 to 250 parts per hour. (See Appendix B. Reporter's Transcript of Joseph Lindsey p. 14, 15 and 28).

That subsequent thereto, Respondent removed the machine from Petitioners place of business in order that the equipment could be modified to operate in accordance with the specific conditions previously set. That the Respondent has been paid in full, the amount of $73,389.75, under the terms of the contract.

That on or about May 21, 1985, Petitioner received a Writ of Attachment and Replevin for possession of the assembly machine. That on or about November 6, 1985, Petitioner filed an Amended Complaint and Respondent filed a Counterclaim on December 12, 1985. (R. 2, 123).

ARGUMENT

I

THE UTAH COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Rule 43(4) of the Rules of the Utah Supreme Court

provides for review by a Writ of Certiorari when the Court of Appeals has decided ..... an important question of state law which has not been, but should be, settled by this court.

The important statute and question in this case, which has never been addressed by this court or any other in this state, decided by the Court of Appeals is U.C.A. Section 58-22-20 and its application to an unlicensed engineer in part as follows:

> No person shall bring or maintain any action in the courts of this state for enforecement of any contract or recovery of any sums due in connection with the practice of engineering ... without alleging and proving that he was duly authorized to practice under the provisions of this act, and no firm, co-partnerhsip, corporation or joint stock association shall bring or maintain any action in the courts of this state for enforcement of any contract or the recovery of any sums due in connection with the practice of engineering ... without alleging and proving that such practice was carried on by professional engineers ... authorized to practice under the provisions of this act.

The Utah Court of Appeals specifically states in their opinion that "there is no Utah case law specifically interpreting this provision or other, similar provisions". (Appendix D Court of Appeals Opinion p.9). Consequently, the interpretion of the above statute is of first impression and should be decided by this court for the following reasons:

1. There is no Utah case law specifically interpreting the statutory provision or other similar provisions.

2. The interpretation of the statute is of first

impression and should be decided by this court to provide consistency, uniformity and direction in the intrepretion of a statute that has substantial importance in the administration of equity, fairness and justice in this case.

3. The standard established by the court of appeals in this case is not found in any statute or case law decision and is inconsistent with the clear language of the statute and its intent.

4. That substantial injustice concerning the petitioner will result without this court providing clear interpretion of the provisions of the Engineers' and Surveyors' Licensing Act.

II

THE PANEL OF THE COURT OF APPEALS HAS DECIDED A QUESTION OF STATE LAW IN A WAY THAT IS IN CONFLICT WITH DECISIONS OF THIS COURT

The Utah Court of Appeals held that the Respondent practiced engineering in the state of Utah without a license as defined by the Engineers' and Surveyors' Licensing Act defined at U.C.A. Section 58-22-2 (1963). The Court of Appeals also found that the Respondent comes under the provisions of the act and is not exempt from its provisions including Section 58-22-20 which states in relevant part, that:

> No person shall bring or maintain any action in the courts of this state for enforcement of any contract or the recovery of any sums due in connection with the practice of engineering or land surveyingwithout alleging and proving that he was duly authorized to practice under the provisions of this act....
> (Appendix Court of Appeals Opinion P. 7, 8, 9)

However, the Appeals Court then went on to rule that the Petitioner is not a member of the class the legislature intended to protect by the statute because Petitioner is not part of the lay public. (Appendix D. Court of Appeals Opinion p.11)

The Court of Appeals indicates that the general rule concerning licensing statutes does not specifically provide, as does Section 58-22-20, that an unlicensed practitioner cannot maintain an action in the state's courts to enforce the terms of his contracts. The Appeals Court then proceeds to interpret the statute by case law dealing with other licensing statutes; those mainly dealing with construction contractors and none dealing with the Engineering Licensing Statute. (Appendix D Court of Appeals Opinion p. 9, 10).

The legislature specifically placed Section 58-22-20 in the statute because it deals with engineers and no other licensed occupations such as contractors. Engineers are part of a profession not generally used by the lay public and the engineering licensing statute recognizes this by the specific provision of 58-22-20 that an unlicensed practitioner cannot maintain an action in the state's courts to enforce the terms of his contracts. The statute does not indicate an intent to only be applicable to the lay public but specifically provides this provision since it is apart from other licensing statutes.

Engineering is a profession that is almost always

employed by businesses and others in the same trade or profession. Few of the lay public would ever use or employ an engineer and consequently this explains why the legislature was specific in adding Section 58-22-20 to the Engineers Licensing Statute denying an unlicensed practitioner access to the courts to enforce the terms of contracts. This is a provision not found in the other licensing statutes in Utah as recognized by the Court of Appeals in their opinion. (Appendix D Court of Appeals Opinion p. 10).

The Court of Appeals then proceeds to interpret Section 58-22-20 with cases decided upon general contractors licensing statutes. Clearly, the general lay public use contractors on a routine, customary and frequent basis unlike the services of an engineer which would normaly never be used by the lay public but be used by businesses and those in the same trade and profession. Accordingly, the legislature intended to separate the Engineering Licensing Statute apart from other licensing statutes to make sure it would be applied to engineers practicing their profession. Otherwise, the intent of the act would be null and void since the general lay public would rarely if every use the services of an engineer.

The cases referred to by the Court of Appeals can be significantly distinquished from the Petitioner's case. First, the contractors cases do not concern the Engineering Licensing Statute and based upon the previous argument should not be

applied to engineers as for their profession concerning the distinction of being employed by the lay public or by businesses in the same trade or profession.

The Court of Appeals relys upon Fillmore Prods., Inc. v. Western States Paving, Inc., 561 p. 2d 687, 689 (Utah 1977), Lingnell v. Berg, 593 p. 2d 800, 805 (Utah 1979) and on Loader v. Scott Construction Corp., 681 p. 2d 1227, 1229 (Utah 1984) cases dealing with contractors and not engineers in making its decision. These cases can be further distinquished from Petitioner's case as follows:

The Petitioner's case is distinquished from the Fillmore Products case, which also deals with a corporation, in that (1) the Respondents were not acting as a subcontractor to a party licensed as an engineer but Respondents were the contracting parties with the Petitioner and were the only contracting parties responsible for the manufacturing of the machine and (2) the project was not under the supervision, direction or control of a licensed project engineer. Mr. Lindsey, an engineer, had no control, direction or supervision over the Respondents or responsibility for the project. (T. 24, 25).

The Lignell case is likewise distinquishable from the case before the court in the following:

1. Respondent Irey did not "just inadvertently" allow his license to lapse. Respondent Irey consciously and

willfully disregarded the licensing statute and practiced his alleged trade as an engineer without an education, a college degree or a license, contrary to civil and criminal law. Licensing did not merely require payment of a fee, but required testing and examination. It did require a demonstration of competence. Respondent Irey has no college degree, has no formal education and no license to practice his claimed profession of engineering. (Depo p. 3) (R. 130 and 131).

In the Lignell case, the owners knew the contractor in his professional capacity and had done work with the contractor previously. Moreover, in Lignell, the owners became their own general contractor, a stature they had taken before with the unlicensed contractor.

In the case before the court, the Petitioner had not had previous professional or trade experience with the Respondent Corporation nor Irey. The Petitioner was not aware that the Respondent, Richard F. Irey, doing business as Industrial Engineering and Manufacturing Corporation, had no formal education in engineering , had no college degree and had no license to prctice engineering in the state of Utah or any other state. (R. 131). Petitioner did not know the Respondents professionally or any other way.

3. In the Lignell case, the contractor supplied a meterialmen's and labor bond. The court said they were better off with a bond than by merely complying with a license

statute. In the case before the court, no bond was posted.

The Loader case is distinquished from Petitioner's case in that (1) the case deals with the contractors licensing statute and not the Engineering Licensing Act, (2) the unlicensed contractor fully performed the contract where the Respondent in this case did not fully perform and (3) the contractors unlicensed status was the result of a good faith mistake where in this case the Respondent did not just allow his license to lapse but consciously practiced his alleged trade without a license, education or college degree. (R. 130 and 131).

Facts of this case clearly should be interpreted with the understanding that the above cases deal with contractors and not engineers. The Court of Appeals holding that Petitioner is outside the intent of the Engineering Act, since Petitioner had employees that were licensed engineers and thus not in need of the protection of the licensing statute's intent to protect the lay public is a rule provided by the assumption that the engineering statute should not apply to businessees and those in the same trade or profession. However, the above cases are distinquished and the Engineering Licensing Act must be intended for all persons as a consequence that the lay public would rarely use an engineer.

CONSLUSION

The Utah Court of Appeals has interpreted a statute

for the first time that should be decided by this court. The Court of Appeals' interpretation is based upon Contractors Licening Statutes and not the Engineering Licensing Statute which specifically provides in Section 58-22-20 that an unlicensed practitioner cannot maintain an action in state court to enforce the terms of his contracts. The intent of the legislative statute must be to protect all persons since the statute would be null and void if it only applied to the lay public as a consequence that the lay public would rarely if ever use the services of an engineer.

Accordingly, it is respectfully requested that this court decide the important question raised herein and judicially determine the intent and interpretation of the Engineers Licensing Statute and its application to the Petitioner and the Respondent in this case.

Dated this 12th day of April, 1990.

TIMOTHY W. BLACKBURN
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of April, 1990, four true and correct copies of the foregoing document were mailed, postage prepaid, to E.H. Frankhauser, Attorney for Respondent, at 243 East 4th South, Suite 200, Salt Lake City, Utah 84111.

TIMOTHY W. BLACKBURN
Attorney for Petitioner

ADDENDUM

APPENDIX A U.C.A. 58-22-2, 20 (1953, as amended)

APPENDIX B Reporter's Transcript of
Joseph W. Lindsey p. 2, 3, 7, 24, 25, 26 and 29

APPENDIX C Reporter's Transcript,
p. 3 through 7, 16 through 20

APPENDIX D Court of Appeals Opinion

APPENDIX A U.C.A. 58-22-2, 20
(1953, as amended)

CHAPTER 22

ENGINEERS AND LAND SURVEYORS

Section 58-22-1. Purpose of act—Unlawful practices.
58-22-2. Definitions.
58-22-3. Administration of act—Committee—Members—Appointment—Term—Oath.
58-22-4. Members of committee—Qualifications.
58-22-5. Per diem and expenses.
58-22-6. Removal of member—Grounds—Vacancies—Method of filling.
58-22-7. Meetings—Officers—Quorum.
58-22-8. Powers.
58-22-9. Director to receive and account for money—Disposition—Expenditures—Budget.
58-22-10. Records—Register of applications for registration—Biennial report.
58-22-11. Roster of registered professional engineers and registered land surveyors.
58-22-12. Applicants—Requirements.
58-22-13. Issuance of certificate to persons currently qualified.
58-22-14. Applications—Fees.
58-22-15. Examinations—Scope.
58-22-16. Certificate of registration—Contents.
58-22-17. Expiration of certificates—Renewal—Fee.
58-22-18. Duties of public bodies engaging in construction of public works.
58-22-19. Revocation of certificates—Grounds—Charges of fraud, deceit, gross negligence, incompetency, or misconduct—Hearing—Reissuing—Appeals.
58-22-20. Offenses—Misdemeanor—Injunctions—Enforcement of act—Authority to practice under act prerequisite for bringing or maintaining action for services.
58-22-21. Exemption.
58-22-22. Existing certificates—Persons presently practicing engineering.

58-22-1. Purpose of act—Unlawful practices.—In order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity practicing or offering to practice engineering or land surveying, shall hereafter be required to submit evidence that he is qualified so to practice and shall be registered as hereinafter provided; and it shall be unlawful for any person to practice or to offer to practice in this state, engineering or land surveying, as defined in the provisions of this act, or to use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is a professional engineer or land surveyor, unless such person has been duly registered under the provisions of this act.

History: L. 1955, ch. 118, § 1.

Title of Act.

An act to regulate the practices of engineering and land surveying; providing for the registration of qualified persons as professional engineers and land surveyors, and providing for the certification of engineers-in-training; defining the terms "engineer," "professional engineer," "engineer-in-training," "practice of engineering," "land surveyor," and "practice of land surveying," "exempting persons, firms, copartnerships, corporations and joint stock associations under certain conditions"; providing for a committee of engineering examiners for professional engineers and land surveyors and the appointment of its members; fixing the terms of the members of said committee and defining its powers and duties; setting forth the minimum qualifications and other requirements for registration; establishing fees with expiration and renewal requirements; imposing certain duties upon the state and political subdivisions thereof in connection with public work and providing for the enforcement of this act and penalties for its violation; and repealing chapter 10, Title 58, Utah Code Annotated 1953.

Cross-Reference.

Licensing of stationary engineers, 17-5-37.

Construction and application.

The validity and application of sections of this act are discussed in Skelton v. Lees, 8 U. (2d) 88, 329 P. 2d 389.

Out-of-state licensee.

Licensed Wyoming engineer and land surveyor may testify concerning survey he conducted in connection with a boundary dispute in Utah though he was not licensed as a surveyor in Utah. Cornia v. Putnam, 26 U. (2d) 354, 489 P. 2d 1001.

Collateral References.

Licenses⇐11(1).

53 C.J.S. Licenses § 30.

Surveyors and civil engineers, 50 Am. Jur. 1149, Surveyors and Civil Engineers § 1 et seq.

Architect's or engineer's compensation as affected by inability to carry out plan or specifications at amount satisfactory to employer, 127 A. L. R. 410.

Constitutionality of statute regulating land surveyors or civil engineers, 55 A. L. R. 307.

What amounts to engineering or architectural services within license requirements, 82 A. L. R. 2d 1013.

DECISIONS UNDER FORMER LAW

Engineering and architecture.

The professions of practicing architecture and professional engineering are related in some particulars, and have at least some activities in common and to that degree overlap; but this does not require one engaged in either to procure a license in the other simply because some of the activities in one overlap the other. Smith v. American Packing & Provision Co., 102 U. 351, 130 P. 2d 951.

Licensed engineer was not required to obtain architect's license merely because his professional services happened to overlap with some architectural functions. Smith v. American Packing & Provision Co., 102 U. 351, 130 P. 2d 951.

Field of professional engineering did not embrace entire field of architecture merely because of some overlapping of their respective functions. Smith v. American Packing & Provision Co., 102 U. 351, 130 P. 2d 951.

Real criterion for deciding whether a licensed engineer had to have an architect's license was whether his services were necessarily embraced by his engineering license, not whether such services could be lawfully performed by an architect. Smith v. American Packing & Provision Co., 102 U. 351, 130 P. 2d 951.

Question of whether an engineer's activities were far enough away from engineering and close enough to architecture to require architect's license would be decided on case by case basis. Smith v. American Packing & Provision Co., 102 U. 351, 130 P. 2d 951.

The assembling of machinery and equipment, and its proper co-ordination in the operation of a packing plant, appeared to be in the field of engineering. Smith v. American Packing & Provision Co., 102 U. 351, 130 P. 2d 951.

Rehabilitation and remodeling of killing floor and meat department of packing plant was engineering, not architecture. Smith v. American Packing & Provision Co., 102 U. 351, 130 P. 2d 951.

58-22-2. Definitions.—Certain words and phrases used in this act, unless contrary to or inconsistent with the context, are defined as follows:

"Director" shall mean the director of registration of the state of Utah.

"Department" shall mean the department of registration of the state of Utah.

The term "engineer" as used in this act shall mean a "professional engineer" as hereinafter defined.

The term "responsible charge" of work means the control and direction by the use of initiative, skill, and independent judgment, of the investigation or design of professional engineering work or the supervision of such projects.

The term "professional engineer" within the meaning and intent of this act shall mean a person who, by reason of his special knowledge of the

mathematical and physical science and the principles and methods of engineering analysis and design, acquired by professional education and practical experience, is qualified to practice engineering as hereinafter defined, as attested by his legal registration as a professional engineer.

The term "engineer-in-training" as used in this act shall mean a candidate for registration as a professional engineer who is a graduate in an approved engineering curriculum of four years or more from a school or college approved by the committee as of satisfactory standing, or who has had four years or more of experience in engineering work of a character satisfactory to the committee; and who, in addition, has successfully passed the examination in the fundamental engineering subjects prior to completion of the requisite years of experience in engineering work, as provided in section 58-22-15, and who shall have received from the committee, as hereinafter defined, a certificate stating that he has successfully passed this portion of the professional examinations.

The term "practice of engineering," within the meaning and intent of this act, shall mean the performance of any professional service or creative work requiring engineering education, training and experience, and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with the utilization of the forces, energies, and materials of nature in the development, production, and functioning of engineering processes, apparatus, machines, equipment, facilities, buildings, structures, works, or utilities, or any combinations or aggregations thereof employed in or devoted to public or private enterprise or uses. The term "practice of engineering" comprehends the practice of those branches of engineering, the pursuit of any of which affects the safety of life, health or property, or the public welfare. Said practice includes the doing of such architectural work as is incidental to the practice of engineering.

A person shall be construed to practice or offer to practice engineering, within the meaning and intent of this act, who practices any branch of the profession of engineering; or who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer, or through the use of some other title implies that he is a professional engineer; or who holds himself out as able to perform, or who does perform any engineering service or work or any other professional service designated by the practitioner or recognized by educational authorities as engineering.

The practice of engineering shall not include the work ordinarily performed by persons who operate or maintain machinery or equipment.

The term "land surveyeor" as used in this act shall mean a person who engages in the practice of land surveying as hereinafter defined.

The practice of land surveying within the meaning and intent of this act includes surveying of areas for their correct determination and de-

scription and for conveyancing, or for the establishment or re-establishment of land boundaries and the plotting of lands and subdivisions thereof.

The term "committee" as used in this act shall mean the representative committee of professional engineers and land surveyors provided for by this act.

History: L. 1955, ch. 118, § 2.

Construction and application.

This act broadened the field of control beyond the three principal fields of mechanical, civil, and electrical engineering. Skelton v. Lees, 8 U. (2d) 88, 329 P. 2d 389.

Collateral References.

Licenses⇐11(1).
53 C.J.S. Licenses § 1.

DECISIONS UNDER FORMER LAW

Architects and engineers.

Former section 58-10-2 did not require an engineer to qualify under chapter 3 of this title simply because some of his activities overlapped those of an architect. Smith v. American Packing & Provision Co., 102 U. 351, 130 P. 2d 951.

58-22-3. Administration of act—Committee—Members—Appointment—Term—Oath.—The administration of this act is hereby devolved upon the department of registration. The committee shall consist of seven professional engineers, one of whom shall be a land surveyor, who shall be appointed by the director from among the nominees recommended by the representative engineering societies in the state and shall have the qualifications required by section 58-22-4. The members of the committee of engineering examiners, as it is constituted at the time of passage of this act, are continued in office until the expiration of their terms, at which time the director shall make an appointment as hereinbefore provided for a period of three years. Said members shall serve from the date of their appointment until the expiration of their terms or until their successors are duly appointed and qualified. Every member of the committee shall receive a certificate of his appointment from the director and before beginning his term of office shall file with the secretary of state his written oath or affirmation for the faithful discharge of his official duty. On the expiration of the term of any member, the director shall, in the manner hereinbefore provided, appoint for a term of three years a registered professional engineer, having the qualifications required by section 58-22-4, to take the place of the member on said committee whose term is about to expire. Each member shall hold office until the expiration of the term for which such member is appointed and until a successor shall have been duly appointed and qualified.

History: L. 1955, ch. 118, § 3.

Effect of repeal.

The repeal of former chapter 10 and the enactment of this chapter effected a change of the whole administrative setup and also the qualifications for registration of engineers. Skelton v. Lees, 8 U. (2d) 88, 329 P. 2d 389.

Collateral References.

Licenses⇐21.
53 C.J.S. Licenses § 37.

58-22-4. Members of committee—Qualifications.—Each member of the committee shall be a citizen of the United States and a resident of this state, and shall have been engaged in the practice of engineering for at least

court. After receipt of said notice the director shall promptly file with the district court a copy of the proceedings had before the committee. The case shall come up for hearing before the district court upon filing and service of notice by either party.

History: L. 1955, ch. 118, § 19.

Nature of review on appeal.

In reviewing an action taken by the department of registration, the district court is limited to a review of the record and is bound by the established rules applicable to such reviews. Skelton v. Lees, 8 U. (2d) 88, 329 P. 2d 389.

Operation and effect of section.

The effect of this section is to provide a method for review by the courts of all matters arising under this chapter and it is improper to look to 58-1-36 for the method of review. Skelton v. Lees, 8 U. (2d) 88, 329 P. 2d 389.

58-22-20. Offenses—Misdemeanor—Injunctions—Enforcement of act—Authority to practice under act prerequisite for bringing or maintaining action for services.—Any person who shall practice, or offer to practice, engineering or land surveying in this state without being registered in accordance with the provisions of this act, or any person presenting or attempting to use as his own the certificate of registration or the seal of another, or any person who shall give any false or forged evidence of any kind to the director or committee or to any member thereof in obtaining a certificate of registration, or any person who shall falsely impersonate any other registrant of like or different name, or any person who shall attempt to use an expired or revoked certificate of registration, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor.

Any person who shall practice, or offer to practice engineering or land surveying in this state without being registered in accordance with the provisions of this act, may be enjoined by the district court from practicing engineering or land surveying until such person shall have been lawfully registered under this act.

It shall be the duty of all duly constituted officers of the law of this state, or any political subdivision thereof, to enforce the provisions of this act and to prosecute and enjoin any persons violating same. The attorney general of the state or his assistant shall act as legal adviser of the director and committee and render such legal assistance as may be necessary in carrying out the provisions of this act.

No person shall bring or maintain any action in the courts of this state for enforcement of any contract or the recovery of any sums due in connection with the practice of engineering or land surveying in this state as defined herein, without alleging and proving that he was duly authorized to practice under the provisions of this act, and no firm, copartnership, corporation or joint stock association shall bring or maintain any action in the courts of this state for enforcement of any contract or the recovery of any sums due in connection with the practice of engineering or land surveying, in this state as defined herein, without alleging and proving that such practice was carried on by professional engineers or land surveyors respectively authorized to practice under the provisions of this act.

History: L. 1955, ch. 118, § 20.

APPENDIX B Reporter's Transcript
of Joseph W. Lindsey
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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

*****

PACIFIC CHROMOLOX DIVISION, EMERSON ELECTRIC COMPANY, PLAINTIFF,	)	
VS.	)	REPORTER'S TRANSCRIPT
RICHARD F. IREY AND INDUSTRIAL ENGINEERING AND MANUFACTURING CORPORATION, DEFENDANT.	)	CIVIL NO. 92090
	)	TESTIMONY OF: JOSEPH W. LINDSEY

*****

BE IT REMEMBERED THAT THIS MATTER CAME ON REGULARLY FOR HEARING BEFORE THE HONORABLE JOHN F. WAHLQUIST, JUDGE, SITTING WITH A JURY AT OGDEN, UTAH ON THE 12TH, 13TH, 16TH, AND 17TH DAYS OF NOVEMBER 1987.

WHEREUPON THE FOLLOWING PROCEEDINGS WERE HAD, TO WIT:

*****

APPEARANCES:

FOR THE PLAINTIFF: TIMOTHY W. BLACKBURN

FOR THE DEFENDANT. E.H. FANKHAUSER

*****

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OGDEN, UTAH NOVEMBER 16, 1982 4:00 P.M.

MR. FANKHAUSER: CALL MR. LINDSEY TO THE STAND PLEASE.

JOSEPH W. LINDSEY,

CALLED AS A WITNESS, BEING FIRST DULY SWORN WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. FANKHAUSER:

Q WOULD YOU STATE YOUR NAME FOR THE COURT AND RECORD PLEASE?

A MY NAME IS JOSEPH W. LINDSEY.

Q WHERE DO YOU RESIDE, MR. LINDSEY?

A IN SANDY, UTAH.

Q AND ARE YOU EMPLOYED?

A SELF-EMPLOYED.

Q HOW LONG HAVE YOU BEEN SELF-EMPLOYED, MR. LINDSEY?

A SINCE 1975.

Q IN WHAT CAPACITY ARE YOU SELF-EMPLOYED?

A WELL, RIGHT NOW I'M AN INDEPENDENT CONSULTING ENGINEER.

Q AND WHAT ARE YOUR QUALIFICATIONS THAT WOULD -- I SHOULD SAY. WHAT ARE YOUR AREAS OF EDUCATION AND EXPERIENCE THAT WOULD QUALIFY YOU TO BE A CONSULTING ENGINEER?

A I HAVE A BACHELOR'S AND A MASTER'S DEGREE IN MECHANICAL ENGINEERING FROM THE UNIVERSITY OF UTAH. I COMPLETED ALL OF THE CLASS WORK REQUIREMENTS FOR A PH.D. IN MECHANICAL ENGINEERING AND ALSO IN CHEMICAL ENGINEERING FROM THE UNIVERSITY OF UTAH.

Q WHAT REMAINS TO BE DONE TO GET YOUR DOCTORATE?

A JUST THE THESIS.

Q OKAY. AND HAVE YOU HAD ANY PRACTICAL EXPERIENCE IN THE FIELD OF ENGINEERING?

A YES. I'VE WORKED SINCE 1960 IN THE FIELD OF ENGINEERING.

Q AND WAS THIS AS A SELF-EMPLOYED CONSULTANT OR WORKING FOR OTHER COMPANIES?

A NO. I WORKED EIGHT AND A HALF YEARS FOR HERCULES, INCORPORATED. I WORKED ABOUT FOUR YEARS FOR IMPERIAL EASTMAN. I WAS A FULL-TIME CONSULTANT FOR TWO YEARS FOR JOHNSON AND JOHNSON. I OWNED AND OPERATED MY OWN BUSINESS SINCE 1971, A LOT OF THAT CONCURRENT WITH SOME OF THE OTHER WORK.

Q IN THE COURSE OF YOUR WORK FOR OTHER COMPANIES AS WELL AS YOURSELF, HAVE YOU EVER MANUFACTURED OR DEVELOPED ANY INDUSTRIAL EQUIPMENT OR MACHINERY?

A YES, QUITE A BIT.

Q AND COULD YOU GIVE US KIND OF A RESUME OF WHAT KIND OF

Q DURING THAT TIME DID YOU SHARE ANY SHOP FACILITIES?
A YES. DICK HAD AN OPERATION THAT HE DID A LOT OF ELECTRONIC ASSEMBLY OVER THERE, AND NEEDED SOME SHEET METAL WORK AND OCCASIONALLY SOME MACHINE SHOP WORK. AND I MADE MY SHEET METAL AND MACHINE SHOP AVAILABLE TO HIM. SOMETIMES HE WOULD COME AND USE IT, SOMETIMES HE WOULD HAVE A MAN COME IN AND RUN MY MACHINES OR SOMETIMES WE WOULD DO THE WORK FOR HIM.
Q OKAY. NOW, ARE YOU A LICENSED PROFESSIONAL ENGINEER IN THE STATE OF UTAH?
A YES, I AM.
Q HOW LONG HAVE YOU BEEN SO LICENSED?
A I'M NOT POSITIVE THE DATE, BUT I WOULD PUT IT IN 1973, 1974.
Q IS YOUR LICENSE CURRENT?
A YES, IT IS.
Q WAS YOUR LICENSE IN EFFECT AND CURRENT DURING THE YEARS '82 THROUGH '85?
A YES.
Q WHEN DID YOU FIRST BECOME INVOLVED ON THE PACIFIC CHROMOLOX JOB, MR. LINDSEY?
A DICK CALLED ME ONE DAY AND SAID THAT HE HAD HAD A MEETING AT CHROMOLOX, AND ASKED ME IF I WOULD COME IN AND DISCUSS WITH HIM SOME OF THE CONCEPTS THAT HE FELT THAT HE COULD USE IN MEETING THEIR REQUIREMENTS. AND I CAME IN AND WE DID THAT. WE WENT OVER THE BASIC CONCEPTS THAT HE HAD AND THE BASIC

Q NOW, DID YOU SEE THE MACHINE OPERATE IN THAT TIME FRAME, SAY, FEBRUARY, MARCH 1985?

A YES, I DID.

Q DID YOU EVER HAVE OCCASION TO TIME IT?

A YES.

Q AND WHEN YOU TIMED IT, WHAT DID YOU FIND ITS PRODUCTION RATE WAS?

A WELL, I WAS ASKED THAT QUESTION EARLIER IN THE DEPOSITION, AND AT THAT POINT I COULDN'T REMEMBER. TIMED IT AGAIN FROM THE VIDEO TAPE YOU JUST SAW --

Q THE VIDEO TAPE WE'VE DISPLAYED HERE?

A YES.

Q OKAY.

A IN FACT, I HAVE TIMED IT AND RE-TIMED IT PROBABLY 50 TIMES IN THE LAST WEEK, AND I GET AN AVERAGE OF AROUND 7.14 SECONDS PER CYCLE.

Q WHAT DOES THAT --

A THAT'S ABOUT 505 PARTS.

Q PER HOUR?

A PER HOUR.

Q NOW, BASED ON YOUR EXPERTISE AND YOUR EXPERIENCE IN THE ENGINEERING FIELD, DO YOU HAVE AN OPINION AS TO WHETHER OR NOT THIS PARTICULAR MACHINE IS WHAT THEY TERM TO BE A CONTINUOUS OPERATION TYPE MACHINE?

A I BELIEVE THAT TO BE TRUE. HOWEVER, THAT -- JUST A

MINUTE -- MACHINE HAS NEVER BEEN OPERATED ON A CONTINUOUS BASIS. CONTINUOUS OPERATION TO ME MEANS THAT THE MACHINE ITSELF WILL NOT FAIL, NOT -- NOT THAT THE MACHINE WILL NOT FUNCTION ON THE PARTS BEING PRODUCED. YOU'RE TALKING ABOUT A CONTINUOUS OPERATION ON THE MACHINE, YOU'RE TALKING ABOUT THE CAPABILITY OF THE MACHINE TO STAND UP UNDER THE WEAR AND TEAR OF CONTINUOUS USE.

Q WELL, THAT'S ONE OF THE FUNCTIONS IS TO DETERMINE THE STRUCTURAL SOUNDNESS OF THIS PARTICULAR MACHINE, ISN'T THAT CORRECT?

A THAT'S CORRECT.

Q AND YOU DID SOME OF THOSE CALCULATIONS WITH REGARD TO STRESS AND THE ACTUAL --

A THAT'S CORRECT, AND I BELIEVE IT -- IN THAT CAPACITY, THE MACHINE WILL MEET THAT, BUT THAT'S YET TO BE PROVEN.

Q I SEE. THAT WOULD BE PROVEN BY A TRUE PRODUCTION RUN OR SOME OTHER FORM --

A THE ONLY WAY YOU CAN EVER PROVE THAT IS TO PUT IT INTO FUNCTION AND LET IT RUN WITH AN EXTENDED PERIOD OF TIME AND SEE WHAT WEAR FACTORS YOU GET ON THE WEAR PARTS, TO SEE WHAT BREAKAGES YOU WOULD GET ON CRITICAL PARTS. ONLY ONE WAY TO PROVE IT, THAT'S TO RUN THE MACHINE.

Q NOW, THERE'S BEEN SOME TESTIMONY IN THIS CASE ABOUT THIS MACHINE NOT BEING ADAPTED OR CONSTRUCTED FOR CONVENIENT SERVICING, REPAIR, AND REPLACEMENT OF COMPONENTS. HAVE YOU

A OVERALL. MAKING SURE THAT THE MACHINE COMPLIES WITH GOOD ENGINEERING PRACTICE AND MANUFACTURING, YES.

MR. FANKHAUSER: THANK YOU.

CROSS-EXAMINATION

BY MR. BLACKBURN:

Q IF THE MACHINE WASN'T WORKING PROPERLY, THEN YOU CONSIDER YOURSELF RESPONSIBLE FOR THAT MACHINE, MR. LINDSEY?

A I DID NOT CONSIDER MYSELF RESPONSIBLE FOR WHETHER OR NOT THE MACHINE WORKS. AGAIN, AS I EXPLAINED TO YOU IN DEPOSITION AND TODAY, THAT IS NOT A PART OF THE CERTIFICATION. CERTIFICATION ONLY CERTIFIES TO THE STRENGTHS, TO THE PROPER CHOICE OF MATERIALS, THE PROPER METHODS --

Q YOU'VE MADE NO CERTIFICATIONS TO THIS MACHINE BY ANY CERTIFIED DRAWINGS, HAVE YOU?

A I HAVE NOT STAMPED ANY DRAWINGS. I -- NOT CERTIFIED IN THAT SENSE.

Q YOU HAVE NOT --

A BUT MY APPROVAL IS THE SAME THING.

Q YOU HAVE NOT MADE ANY DRAWINGS ON THIS PARTICULAR MACHINE, ISN'T THAT TRUE?

A I DON'T ORDINARILY DO DRAFTING, NO.

Q ISN'T IT TRUE THAT MR. IREY WOULD DESIGN IT, THEN BRING IT TO YOU FOR YOUR REVIEW OF THE ITEMS THAT WERE -- YOU'VE TALKED ABOUT?

A THAT'S CORRECT IN MOST CASES. THAT I WOULD REVIEW A

DESIGN THAT WAS ALREADY DONE. AND SUGGEST WHATEVER MODIFICATIONS THAT I FELT WERE REQUIRED TO MAKE BETTER USE OF MATERIALS OR TO STRENGTHEN A PART OF REQUIRED -- IN THAT CAPACITY.

Q NOW, INITIALLY HE CAME TO YOU AND YOU WENT WITH A CHALK BOARD TALK ON THE MACHINE, I GUESS, IS THAT CORRECT?

A THAT'S CORRECT.

Q THAT WAS FOR DESIGN OF THE FRAME?

A HE INITIALLY CAME TO ME WITH THE ENTIRE CONCEPT. WE BROKE IT DOWN INTO VARIOUS FUNCTIONS, LOOKED AT MODULES THAT WOULD BE REQUIRED TO ACCOMPLISH IT.

Q WAS THAT INITIALLY ON THE BLACKBOARD IS HOW YOU DID THAT?

A YES.

Q IN THAT REVIEW PROCESSION -- OR THAT PROCESS, WAS ANYTHING DESIGNED I GUESS BY MR. IREY AND YOU REVIEWED IT AFTER THAT PROCESS?

A OH, I'M SURE THERE WERE A LOT OF CASES WHERE HE MADE THE SUGGESTION AND SOME WHERE I MADE THE SUGGESTION, I'M SURE THAT'S POSSIBLE, YES.

Q AS I UNDERSTAND, YOU'RE NOT AN EMPLOYEE OF INDUSTRIAL ENGINEERING AND MANUFACTURING?

A THAT'S CORRECT.

Q YOU'RE NOT AN OFFICER OF INDUSTRIAL ENGINEERING AND MANUFACTURING?

A THAT'S CORRECT.

Q YOU RECEIVED -- OR DID YOU RECEIVE MONEY FOR THIS PARTICULAR --

A YES, I DID. IN FACT, I DID. I DID. I RECEIVED $2,000.

Q WAS THAT ON THIS PARTICULAR PROJECT?

A ON THIS PROJECT, YES.

Q AND OTHER THAN THAT, YOU TRADED BACK AND FORTH WITH MR. IREY?

A YES.

Q DID YOU RECEIVE SOME STOCK IN THE COMPANY?

A BACK WHEN WE ORIGINALLY MADE OUR ARRANGEMENT BETWEEN US TO -- FOR HIM TO USE ME AS A CONSULTANT AND FOR ME TO USE HIM AS A CONSULTANT, AT THAT TIME HE OWED ME SOME MONEY FOR SOME WORK THAT I HAD ALREADY DONE FOR HIM. SO AS A WAY OF PAYING THAT OFF AND AS AN ENTICEMENT TO CONSUMMATE THE AGREEMENT THAT WE HAD BETWEEN US, YES, I DID END UP TAKING $40,000 OF STOCK IN THE COMPANY.

Q DID HE GIVE YOU A STOCK CERTIFICATE FOR THAT STOCK?

A YES, HE DID.

Q AND THAT WAS IN EXCHANGE FOR LABOR, NO MONEY TRANSACTED ACROSS, IT WAS -- HE OWED YOU SOME MONEY AND GAVE YOU THE STOCK FOR THE MONEY HE OWED YOU?

A THAT'S CORRECT.

Q DID YOU EVER MEET WITH ANYBODY AT PACIFIC CHROMOLOX CONCERNING THE MACHINE?

A NO, I DID NOT.

Q DO YOU RECALL WHEN YOU DID THAT?
A OFF AND ON SEVERAL TIMES THROUGH THE MACHINE'S DEVELOPMENT.
Q WELL, CAN YOU GIVE US ANY DATES, JUST --
A NO.
Q -- OR TIMES?
A I COULDN'T.
Q CAN YOU GIVE US ANY RESULTS?
A YES. EARLY IN THE MACHINE'S DESIGN, YOU WERE LOOKING AT -- AND I CAN'T VERIFY THAT AT THIS DATE THAT I TOOK A TEST AND IT WAS THIS MANY SECONDS, BUT THE COLLECTIVE IMPRESSION FROM SEVERAL TESTS WAS THAT THE MACHINE WAS OPERATING DOWN AROUND 200, 250 PARTS PER HOUR FOR -- I WOULD SAY ABOUT '83, '84, THROUGH THERE.
Q CAN YOU REMEMBER HOW MANY PARTS WERE PUT THROUGH THE MACHINE TO DETERMINE YOUR PROJECTION IN '83 AND '84 AT 200, 250 PARTS?
A I NEVER SAW MORE THAN, SAY, 20 TO 30 COILS RUN AT A TIME.
Q DID YOU SEE DIFFERENT TYPE GAUGE COILS AND DIFFERENT SIZE DIAMETER COILS RUN OR WERE THEY ALL THE SAME SIZE?
A I NEVER MEASURED THEM TO SEE WHAT SIZE THEY WERE. THE COILS THAT DICK HAD AT HIS SHOP TO TEST I THINK WERE MOSTLY OF THE MIDDLE RUN SIZES. IT'S BEEN TESTIFIED HERE THAT THOSE FELL IN THE 25, 26 GAUGE RANGE. I NEVER FELT IT WAS MY PLACE TO GO INTO HIS SHOP AND MEASURE ANY OF THOSE COILS MYSELF. I

WOULD RELY UPON HIM.

Q SO AS TO DIFFERENT GAUGE COILS, DIFFERENT SIZE DIAMETERS, DIFFERENT LENGTHS, YOU PERFORMED NO PROJECTION TEST WITH THOSE OTHER THAN THE ONES YOU OBSERVED HIM HAVING IN THE SHOP WHICH ARE THE -- I GUESS THE 25, 24, 26 AREA?

A I NEVER CONDUCTED ANY TESTS WITH THE MACHINE.

Q OKAY.

A WHETHER IT WAS RUNNING IT OR TIMING OR ANYTHING ELSE, OTHER THAN -- OTHER THAN THE TIME SEQUENCES THAT I WATCHED MYSELF AND VOLUNTARILY TIMED, I HAVE OBSERVED SEVERAL OF THE MODULES IN MODULAR FUNCTION ON THE BENCH, AND I WAS THERE A NUMBER OF TIMES WHEN SOMEONE ELSE WAS OPERATING THE MACHINE, BUT I NEVER RAN THE MACHINE.

Q MAYBE I ASKED YOU THIS, I APOLOGIZE, DID YOU MAKE ANY DRAWINGS OR DESIGNS AT ALL FOR THE MACHINE?

A NOT DIRECTLY, NO.

Q DO YOU REMEMBER ANY MAJOR PROBLEMS THAT DICK WAS HAVING WITH THE MACHINE AS IT WAS BEING BUILT?

A YES.

Q WHAT WERE THOSE PROBLEMS?

A THERE WAS A PROBLEM OF COURSE WITH THE ORIENTER. I SAY MAJOR PROBLEMS, MAJOR IN THE SENSE THAT IT WAS AN ONGOING STRUGGLE. I DON'T THINK THERE WAS ANY PROBLEM THERE THAT I WOULD SAY WAS MAJOR IN THE SENSE THAT I DIDN'T FEEL THAT IT COULD BE ACCOMPLISHED OR THAT HE WOULD BE ABLE TO ACCOMPLISH

APPENDIX C Reporter's Transcript
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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

2

*****

PACIFIC CHROMOLOX DIVISION, EMERSON ELECTRIC COMPANY, PLAINTIFF, VS. RICHARD F. IREY AND INDUSTRIAL ENGINEERING AND MANUFACTURING CORPORATION, DEFENDANTS.	REPORTER'S TRANSCRIPT CIVIL NO. 92090

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BE IT REMEMBERED THAT THIS MATTER CAME ON REGULARLY FOR HEARING BEFORE THE HONORABLE JOHN F. WAHLQUIST, JUDGE, SITTING WITH A JURY AT OGDEN, UTAH ON THE 12TH, 13TH, 16TH, AND 17TH DAYS OF NOVEMBER 1987.

WHEREUPON THE FOLLOWING PROCEEDINGS WERE HAD, TO WIT:

*****

APPEARANCES:

FOR THE PLAINTIFF: TIMOTHY W. BLACKBURN

FOR THE DEFENDANT. E.H. FANKHAUSER

*****

PLAINTIFF. IN ORDER FOR THEM TO DO THAT, AND THEY HAVE ALLEGED THAT THE CORPORATION WAS A SHAM AND A FRAUD. AND HERE AGAIN, THERE'S ABSOLUTELY NO EVIDENCE BEFORE THE COURT THAT THAT IS THE SITUATION HERE AT ALL. AND I WOULD MOVE THE COURT THAT THESE MATTERS BE DISMISSED. FURTHER, THE BURDEN WITH REGARD TO THE SIXTH CLAIM FOR RELIEF MUST BE CLEAR AND CONVINCING EVIDENCE RATHER THAN A MERE PREPONDERANCE. AND I BELIEVE I WOULD ADDRESS THE COURT TO THE DOCKSTADER CASE, WHICH SAYS YOU MUST PROVE THAT THE CORPORATION ENTITY WAS USED, QUOTE, UNQUOTE, FOR THE PURPOSE OF PERPETRATING A FRAUD OR SOME OTHER TYPE OF INJURY OR TORT IN ORDER TO PIERCE THE CORPORATE VEIL, AND THAT MUST BE PROVED BY CLEAR AND CONVINCING EVIDENCE. BASED ON THAT WE ASK THOSE TWO CLAIMS BE DISMISSED FOR INSUFFICIENT EVIDENCE.

MR. BLACKBURN: WE HAVE NO OBJECTION.

THE COURT: GRANT BOTH MOTIONS.

MR. BLACKBURN: YOUR HONOR, AT THIS TIME WE WOULD MAKE A MOTION TO DISMISS PLAINTIFF -- EXCUSE ME, DEFENDANTS' COUNTERCLAIM BASED UPON SECTION 58-22-20, UTAH CODE ANNOTATED, WHICH READS THIS: "NO PERSON SHALL BRING OR MAINTAIN ANY ACTION IN THE COURTS OF THIS STATE FOR ENFORCEMENT OF ANY CONTRACT OR THE RECOVER OF ANY SUMS DUE IN CONNECTION WITH THE PRACTICE OF ENGINEERING OR LAND SURVEYING IN THIS STATE AS DEFINED HEREIN WITHOUT ALLEGING AND PROVING THAT HE WAS DULY AUTHORIZED TO PRACTICE UNDER THE PROVISIONS OF THIS ACT, AND

NO FIRM, CO-PARTNERSHIP, CORPORATION OR JOINT STOCK ASSOCIATION SHALL BRING OR MAINTAIN ANY ACTION IN THE COURTS OF THIS STATE FOR ENFORCEMENT OF ANY CONTRACT OR THE RECOVERY OF ANY SUMS DUE IN CONNECTION WITH THE PRACTICE OF ENGINEERING OR LAND SURVEYING IN THIS STATE AS DEFINED HEREIN WITHOUT ALLEGING AND PROVING THAT SUCH PRACTICE WAS CARRIED ON BY PROFESSIONAL ENGINEERS OR LAND SURVEYORS RESPECTIVELY AUTHORIZED TO PRACTICE UNDER THE PROVISIONS OF THIS ACT."

THERE'S NO ALLEGATION IN THEIR COUNTERCLAIM THAT THE CORPORATION -- THAT THERE'S ANY AUTHORIZED ENGINEERS LICENSED TO PRACTICE ENGINEERING IN THIS STATE IN THEIR COUNTERCLAIM --

THE COURT: JUST A MOMENT. WASN'T THIS MOTION PRESENTED TO THE OTHER JUDGE?

MR. BLACKBURN: NO. THE MOTION BEFORE THE OTHER JUDGE WAS SIMPLY THAT THE -- THERE WAS NO ENGINEERING. IT WAS THAT THE -- THERE WAS NOT AN ENGINEER. IT WAS NOT THAT THEY DID NOT ALLEGE IT IN THEIR COMPLAINT. WE DIDN'T BRING IT AT THAT TIME BECAUSE PERHAPS THEY COULD HAVE AMENDED IT. THERE IS NO ALLEGATION IN THEIR COMPLAINT. THE ISSUE BEFORE THIS COURT, WHETHER THERE WAS A LICENSED ENGINEER WORKING FOR THE COMPANY, HAD NOTHING TO DO WITH ALLEGING IT IN THEIR COMPLAINT. NO ALLEGATION WHATSOEVER IN THE COUNTERCLAIM. THEY'RE BARRED FROM MAINTAINING AN ACTION BECAUSE THEY DO NOT HAVE THAT ALLEGATION IN THEIR COUNTERCLAIM.

THE COURT: YOU MAY RESPOND.

MR. FANKHAUSER: WELL, YOUR HONOR, I DISAGREE WITH COUNSEL ON THAT RESPECT. NUMBER ONE -- I'M LOOKING FOR THE MEMORANDUM WHICH WE SUBMITTED; HOWEVER, THEY'RE ON FILE. THIS MATTER WAS ARGUED BY SUMMARY JUDGMENT MOTION BEFORE JUDGE ROTH AND IT WAS DENIED AT THAT PARTICULAR TIME. FURTHERMORE, COUNSEL WAS WELL PLACED ON NOTICE OF THAT PARTICULAR DEFENSE, ALTHOUGH WE DID NOT FORMALLY MODIFY OUR COUNTERCLAIM TO ALLEGE THAT. IT'S OUR POSITION AS SET FORTH IN THE COUNTERCLAIM THAT THAT IS NOT NECESSARY WHERE THIS IS NOT A PARTY, QUOTE, END QUOTE, THAT IS INTENDED TO BE PROTECTED UNDER THE STATUTE. WHAT YOU HAVE HERE IS YOU HAVE TWO CORPORATIONS, BOTH ENGAGED IN THE MANUFACTURING FIELD. NEITHER ONE OF THOSE CORPORATIONS ARE DOING THEIR WORK FOR THE GENERAL LAY PUBLIC PER SE. CHROMOLOX IS PRODUCING THEIR OWN UNITS FOR THEIR OWN CUSTOMERS, WHICH ARE INDUSTRIAL. INDUSTRIAL ENGINEERING IS PRODUCING WHATEVER IT PRODUCES FOR, QUOTE, END QUOTE, INDIVIDUAL SPECIALIZED CUSTOMERS. AND THEREFORE, IT'S NOT THIS PARTICULAR STATUTE, WE COME WITHIN SOME OF THE EXEMPTIONS SET FORTH IN OUR MEMORANDUM. ALL THAT WAS ARGUED AT THE TIME OF SUMMARY JUDGMENT BEFORE JUDGE ROTH. EVEN IF IT WASN'T, I WOULD MOVE THE COURT AT THIS POINT TO AMEND THE COUNTERCLAIM TO CONFORM TO THE MOTIONS AND THE SUMMARY JUDGMENT WHICH WERE ARGUED BEFORE, WHICH WOULD PUT THIS IN PROPER PERSPECTIVE.

THE COURT: DO YOU HAVE -- ARE YOU GOING TO HAVE EVIDENCE THAT THERE ARE EMPLOYED LICENSED ENGINEERS ON IN THIS

CASE IN YOUR CASE IN CHIEF?

MR. FANKHAUSER: YES. I HAVE MR. LINDSEY, AND IF NECESSARY, WE CAN BRING IN MR. ROBERT GRIFFIN WHO WAS ALSO CONSULTED AND THE PERSON WHO IS A LICENSED PROFESSIONAL ENGINEER. MR. LINDSEY IS A LICENSED PROFESSIONAL ENGINEER WHO IS A STOCKHOLDER OF THE CORPORATION, WHO WAS CONSULTED AND HAS BEEN INVOLVED IN THIS PROJECT FROM ITS OUTSET.

THE COURT: YOU MAY RESPOND.

MR. FANKHAUSER: AN AFFIDAVIT IS ON FILE FROM MR. LINDSEY TO THAT EFFECT.

MR. BLACKBURN: MR. IREY'S INCORRECT. EVEN IF YOU'RE ALLEGING THAT IT COMES UNDER THE EXEMPTION, THE LAW REQUIRES THAT YOU PLEAD THE EXEMPTION IN THE CASE. THE ONLY ISSUE THAT WAS BEFORE JUDGE ROTH WAS WHETHER A LICENSED ENGINEER WAS PARTICIPATING, AND JUDGE ROTH SAID THERE WAS A FACTUAL ISSUE. THE CASE IS WHERE THEY HAVE TO PLEAD THAT AND IT MUST BE PLED IN THE COMPLAINT, IT CANNOT BE AMENDED NOW, BUT IT MUST BE PLED IN THE COMPLAINT. A PERSON SEEKING RECOVERY FOR PERSONAL SERVICE FOR WHICH A LICENSE IS REQUIRED AS A CONDITION PRECEDENT TO THE RENDITION THEREOF FOR A FEE MUST ALLEGE AND PROVE FACTS WHICH SHOW HE WAS LICENSED AT THE TIME SUCH SERVICES WERE PERFORMED OR HE WAS EXEMPT FROM THE CLASS REQUIRED TO HAVE SUCH LICENSE. THAT MUST BE SPECIFICALLY PLED AND IT MUST BE SPECIFICALLY PROVEN. THERE IS NO PLEADING ON FILE WITH THIS COURT THAT PLEADS THAT AT ALL. AND THEY CANNOT

MAINTAIN A CLAIM UNDER THAT WITHOUT PLEADING IT FIRST. IT'S VERY CLEAR FROM THE STATUTE IN THE CASE.

THE COURT: THE COURT IS SOMEWHAT FAMILIAR WITH THE FILE. THE COURT NOTES THAT PROCEEDINGS TOOK PLACE IN FRONT OF THE OTHER DISTRICT COURT, AND BELIEVES THAT IN SUBSTANCE THE SAME ISSUE WHICH IS HERE PRESENTED WAS PRESENTED THERE. BOTH SIDES WERE PUT ON NOTICE AT THAT TIME THAT THE -- IT WAS DEFENDANTS' CONTENTION THAT THEY'RE PREPARED TO PROVE THAT A LICENSED ENGINEER WAS USED IN THE PREPARATION OF THE ARTICLE IN QUESTION. FOR THIS REASON, THE COURT WILL DENY THE MOTION.

IS THERE ANYTHING ELSE?

MR. BLACKBURN: NO, YOUR HONOR.

THE COURT: LET ME ALSO, WHILE I HAVE THE JURY OUT FOR A MINUTE, I NOTE THAT -- I BELIEVE IT'S JUDGE HYDE GAVE AN ORDER AND THE MACHINE IS NOW IN PLAINTIFF'S POSSESSION, IS THAT TRUE?

MR. BLACKBURN: IT'S NOT IN OUR POSSESSION. IT'S IN THE SHERIFF'S POSSESSION IN A WAREHOUSE. I MEAN WE DON'T HAVE IT, IT'S IN A WAREHOUSE.

MR. FANKHAUSER: WELL, THE SHERIFF DOESN'T HAVE POSSESSION. THEY'RE RENTING THE WAREHOUSE, THEY'RE PAYING THE BILL, AND THEY HAVE THE KEY. THE SHERIFF HAS -- IS NOT HOLDING IT UNDER ANY WRIT THAT I'M AWARE OF. IT WAS ORDERED BY JUDGE HYDE THAT IT REMAIN THERE UNLESS IT COULD BE WORKED OUT BETWEEN THE PARTIES OR UNTIL FURTHER ORDER OF THE COURT,

ANYTHING ELSE?

MR. BLACKBURN: YES. THE THIRD MOTION IS, AGAIN, IS BACK TO THE LICENSED ENGINEERING. WE'VE MADE A MOTION ALREADY AND WE WOULD REINSTITUTE THE MOTION CONCERNING THAT THE COMPLAINT HAS NOT ALLEGED THAT A LICENSED ENGINEER AS REQUIRED BY THE STATUTE, AND THE COURT'S PREVIOUSLY RULED ON THAT. BUT I'M REINSTITUTING THAT MOTION AT THIS TIME, BUT ALSO THAT THEY HAVE NOT PRESENTED A PRIMA FACIE CASE THAT A LICENSED ENGINEER MANUFACTURED THIS DOCUMENT. THE ONLY EVIDENCE BEFORE THE COURT IS THAT A CERTIFIED ENGINEER REVIEWED THE PLANS AND REVIEWED THE DESIGNS. HE NEVER CONSULTED WITH PACIFIC CHROMOLOX, HE NEVER ENTERED INTO ANY AGREEMENTS, HE NEVER CERTIFIED OR DREW ANY PLANS, NEVER CONSULTED OR REVIEWED WITH A COMPLAINT, AND IT WAS ALL ON A LABOR TRADING BASIS. THIS IS SIMILAR TO SOMEONE GOING TO AN ATTORNEY AND HAVING THE ATTORNEY REVIEW DOCUMENTS AND HAVING THAT INDIVIDUAL GO FORWARD AND DOING THEM WITHOUT THE ATTORNEY EVER SIGNING THEM. AND THAT'S JUST NOT WHAT THE STATUTE IS TRYING TO PROTECT. IT SHOULD BE THE OTHER WAY AROUND. MR. IREY SHOULD BE WORKING FOR MR. LINDSEY AND NOT THE OPPOSITE WAY AROUND. AND MR. LINDSEY SHOULD BE THE ONE THAT'S INVOLVED IN THIS. HE INDICATED THAT HE HAD NOT TOTAL RESPONSIBILITY FOR THE MACHINE, THAT HE SAID HE WAS RESPONSIBLE FOR THE PARTS THAT HE LOOKED AT, AND THAT WAS THE STRUCTURE OF THE DESIGN. BUT THERE'S NO EVIDENCE THAT HE WAS INVOLVED IN THE MANUFACTURING

OF THE MACHINE WHERE HE WAS DOING IT. THE ONLY EVIDENCE, I GUESS THERE'S SOME EVIDENCE, THAT'S THE 140 HOURS HE WORKED ON THE MACHINE THROUGH HIS TESTIMONY. AND I SUBMIT THAT THEY CAN ONLY RECOVER THE 140 HOURS THAT MR. LINDSEY WORKED ON THE MACHINE UNDER THAT PARTICULAR STATUTE.

THE COURT: YOU MAY COMMENT.

MR. FANKHAUSER: I BELIEVE, YOUR HONOR, THE BURDEN OF THE STATUTE'S BEEN MET UNEQUIVOCALLY IN TWO RESPECTS. NUMBER ONE, THE CORPORATION DID NOT ALLEGE TO BE A PROFESSIONAL ENGINEER BECAUSE A CORPORATION OBVIOUSLY CANNOT BE THAT. NUMBER TWO, THE STATUTE PROVIDES THAT IF YOU ARE A CORPORATION, THAT YOU MUST SHOW THAT THE ENGINEERING FUNCTIONS ARE PERFORMED EITHER BY A LICENSED PROFESSIONAL ENGINEER OR UNDER THE SUPERVISION OR IN CONCERT WITH A LICENSED PROFESSIONAL ENGINEER. THE EVIDENCE IS UNEQUIVOCAL AND UNCONTRADICTED IN THAT RESPECT. FURTHERMORE, THE STATUTE DOESN'T REQUIRE THAT THAT ENGINEER BE COMPENSATED. I DON'T THINK THE STATUTE SETS THE CONTRACT UNDER WHICH THE PEOPLE WANT TO WORK, THAT'S IMMATERIAL. THIRDLY, THE HOURS THAT MR. LINDSEY TESTIFIED TO WAS APPROXIMATELY 280, 140 ON THE MODIFICATION. THEREFORE, I THINK THAT'S APPROPRIATE. AND HE WORKED ON THOSE MODIFICATIONS, HE APPROVED THOSE THINGS, AND I THINK THAT THE STATUTE'S BURDEN HAS BEEN MET NOT ONLY WITH A MERE PREPONDERANCE, BUT WITH A SUBSTANTIAL PREPONDERANCE, AND I THINK THE MOTION SHOULD BE DISMISSED.

MR. BLACKBURN: JUST TO BRIEFLY RESPOND, MR. LINDSEY IS NOT AN EMPLOYEE OF THE COMPANY, HE'S NOT AN OFFICER OF THE COMPANY, HE'S NOT A DIRECTOR OF THE COMPANY. HE'S A STOCKHOLDER OF THE COMPANY, THE SAME AS THE JUDGE IS PROBABLY A STOCKHOLDER IN SOME COMPANIES, THE SAME AS I'M A STOCKHOLDER IN SOME COMPANIES, BUT HE'S NOT AN OFFICER, HE'S NOT A DIRECTOR, HE'S NOT AN EMPLOYEE OF THAT PARTICULAR COMPANY. HE DOESN'T WORK FOR THEM. WHAT THAT STATUTE MEANS IS THE LICENSED ENGINEER WILL BE AN EMPLOYEE, OFFICER, OR DIRECTOR OF THE COMPANY. THIS COMPANY HAS NO LICENSED ENGINEER WITH IT AT ALL, AS TESTIFIED TO BY MR. LINDSEY. HE WAS ONLY THERE TO CONSULT BECAUSE THEY'RE IN THE SAME BUILDING. HE'S NOT PART OF THAT CORPORATION AT ALL.

THE COURT: THE COURT DENIES THE MOTION. THE COURT DOES SO FOR THE FOLLOWING REASONS: FIRST OF ALL, THE COURT BELIEVES THAT THE MATTER'S ALREADY BEEN RULED ON BY ANOTHER JUDGE, AND THEREFORE, IS THE LAW OF THE CASE. BUT IN ADDITION THERETO, THE COURT RULES THAT THE MOTION SHOULD BE DENIED, FIRST OF ALL, THE CORPORATION -- THE UNDISPUTED EVIDENCE WHICH I HAVE BEFORE ME IS THAT THE CORPORATION DID HAVE AVAILABLE TO IT THE SERVICES OF LICENSED ENGINEERS WHO WERE CONCERNED WITH THE CONSTRUCTION AND WERE COUNSELED ON THE MATTER. IN ADDITION TO THIS, I BELIEVE THE EARLIER JUDGE HAS RULED THAT THIS IS NOT NECESSARILY ONE OF THOSE SITUATIONS WHERE YOU ARE INVOLVED IN PROTECTION OF THE GENERAL PUBLIC, BUT IS -- THIS

IS A SITUATION WHERE YOU'RE INVOLVED IN THE TECHNICAL DEALINGS OF CORPORATIONS, BOTH OF WHICH HAVE THE SERVICES OF TRAINED ENGINEERS. IS THERE ANYTHING FURTHER?

MR. BLACKBURN: NO, YOUR HONOR. THAT'S OUR MOTIONS.

THE COURT: ALL RIGHT. HAVE YOU HAD A CHANCE TO LOOK AT THESE INSTRUCTIONS SO YOU CAN TAKE YOUR EXCEPTIONS AND WE'LL BE READY TO GO WITH THE JURY WHEN THEY COME BACK?

MR. FANKHAUSER: THE ONES WE HAD THIS MORNING, YOUR HONOR?

THE COURT: YES.

MR. BLACKBURN: NO.

MR. FANKHAUSER: I HAVEN'T SEEN ANY UPDATES.

THE COURT: HERE THEY ARE.

MR. BLACKBURN: NO, I HAVEN'T HAD A CHANCE TO LOOK AT THESE.

THE COURT: WHAT DO YOU MEAN, I GAVE THEM TO YOU LAST NIGHT.

MR. BLACKBURN: THESE WEREN'T --

MR. FANKHAUSER: WE JUST GOT THEM NOW.

THE COURT: JUST THE TWO WORDS CHANGED IS ALL.

MR. BLACKBURN: OKAY.

MR. FANKHAUSER: YOU INDICATED, YOUR HONOR, THAT YOU'RE GOING TO ADD MAYBE ONE OR TWO. DID YOU DO THAT?

THE COURT: I DID NOT ADD -- DECIDED NOT TO ADD THEM.

MR. FANKHAUSER: IN OTHER WORDS, YOU JUST MADE THE WORD CHANGES?

THE COURT: THAT'S RIGHT.

MR. BLACKBURN: OKAY. I COULD TAKE MINE. I'M READY TO TAKE MY EXCEPTIONS.

THE COURT: ALL RIGHT.

MR. BLACKBURN: ONE OF OUR CAUSES OF ACTION IS FOR BREACH OF WARRANTY. THERE'S NO INSTRUCTION IN HERE CONCERNING BREACH OF WARRANTY FOR THE JURY TO RULE ON. SO WE EXCEPT TO IT, THE LACKING OF THIS INSTRUCTION. WE SUBMITTED ONE TO THE COURT ON BREACH OF WARRANTY.

THE COURT: YOU MAY TAKE YOUR EXCEPTIONS.

MR. FANKHAUSER: AS I UNDERSTAND IT, WAS THE INSTRUCTION ON PROXIMATE CAUSE REMOVED?

THE COURT: YES, TOOK ONE OUT.

MR. FANKHAUSER: OKAY. THE DEFENDANT WOULD OBJECT TO THE NON GIVING OF THE INSTRUCTION REGARDING REASONABLE VALUE OF LABOR PERFORMED. ALSO TO THE NON-GIVING OF AN INSTRUCTION AS TO ESTOPPEL AND WAIVER ON THE PART OF THE PLAINTIFF, WHERE IT REMOVED THE MACHINE FROM THE CUSTODY OF THE DEFENDANT AND HAS WITHHELD THE MACHINE FROM THE DEFENDANT SINCE THAT TIME, AND I THINK THAT THAT WOULD BE SOMETHING THE JURY SHOULD CONSIDER REGARDING WHETHER OR NOT PERFORMANCE HAS BEEN MET TO THE EXTENT THAT IT WAS -- THE DEFENDANT WAS ABLE TO PERFORM. AND THAT GOES TO THE ISSUE OF BREACH OF CONTRACT. I THINK THERE SHOULD BE AN INSTRUCTION ON MEETING OF THE MINDS RELATIVE TO, QUOTE, END QUOTE, THE MODIFICATIONS AND CHANGES TO THESE

APPENDIX D Court of Appeals Opinion

COVER SHEET

CASE TITLE:
Pacific Chromolox Division,
Emerson Electric Company,
Plaintiff and Appellant,
v. No. 880203-CA
Richard F. Irey and Industrial
Engineering and Manufacturing
Corporation and John Does I
through V,
Defendant and Respondent.

PARTIES:
Timothy W. Blackburn
Ron R. Kunzler (Argued)
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TRIAL COURT:
Honorable John F. Wahlquist
Second District
Weber County
#92090

February 12, 1990 - Opinion by Judge Regnal W. Garff
Concurred: Judge Russell W. Bench
Judge Gregory K. Orme

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the trial court herein be, and the same is, affirmed.

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of February, 1990, a true and correct copy of the attached opinion was mailed to each of the above parties and to the trial court.

Julia Whitfield
Deputy Clerk

IN THE UTAH COURT OF APPEALS

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Pacific Chromalox Division, Emerson Electric Company,	)	OPINION (For Publication)
Plaintiff and Appellant,	)	
v.	)	Case No. 880203-CA
Richard F. Irey, Industrial Engineering and Manufacturing Corporation, and John Does I through V,	)	
Defendants and Respondents.	)	

Second District, Weber County
The Honorable John F. Wahlquist

Attorneys: Timothy W. Blackburn and Ron R. Kunzler, Ogden, for Appellant
Ephraim H. Fankhauser, Salt Lake City, for Respondents

Before Judges Bench, Garff, and Orme.

GARFF, Judge:

Appellant Pacific Chromalox Division, Emerson Electric Co. (Chromalox) brought an action against respondents Richard F. Irey (Irey) and Industrial Engineering and Manufacturing Corp. (I.E.M.) for breach of contract and breach of warranty. Respondents counterclaimed for breach of contract and unjust enrichment. After a jury trial, the jury ruled in favor of respondents. We affirm.

Chromalox, a subsidiary of Emerson Electric, is a manufacturer of industrial heating elements which it sells to companies that produce heating equipment for commercial applications. It does not sell heating elements to residential customers. Irey, as the president and owner of I.E.M., designs

and builds one-of-a-kind automated machines. I.E.M.'s staff includes Irey's wife, some machinists and assembly people, and some consulting engineers, including Joseph W. Lindsey.

During the summer of 1982, Chromalox's manager of manufacturing engineering, Ned Blackett, in response to corporate cost-cutting targets, was interested in reducing the cost of Chromalox's complicated, labor intensive process for producing heating coils. He did not know if it was possible to build a machine to automate this process, but was interested in the possible savings that might result if such a machine could be built. He first offered this "high risk" project to another company, which declined it. Blackett then heard about Irey's work in automation engineering and offered the project to him.

Irey visited the Chromalox facility, located in Ogden, Utah, and observed the coil production process. On about August 10, 1982, he hand-carried a proposal for the machine to Chromalox and met with Blackett. He told Blackett that he could build a machine to duplicate the process exactly. Blackett told Irey that he could not pay more than $75,000 for the machine because of corporate financial restrictions, but if the machine worked, Chromalox might be interested in a second machine for another plant, and that Chromalox had need of other types of automated machinery which Irey might be able to build.

On November 2, 1982, I.E.M., through Irey, agreed to manufacture the machine for Chromalox for $69,896 plus tax, with delivery to take place in fourteen to sixteen weeks. Irey arrived at this price by subtracting the requisite amount of sales tax from Chromalox's $75,000 ceiling. He deliberately underbid the project, which he figured would cost about $120,000 to complete, because he felt, on the basis of Blackett's representations that a second machine might be needed and that Chromalox was interested in additional automated machinery, that it was an investment in his future business. To meet the price ceiling, Irey and Blackett agreed to eliminate a washer orienter called for in the original specifications.

Blackett filed a purchase requisition for the machine on November 9, 1982. Specifications set forth in the purchase order included the following: The machine was to be capable of applying a stud on both ends of a heating coil, which could range in diameter from .06" to .115", at a minimum rate of 600 coils per hour. It was to accept coils made from twenty to thirty-two gauge wire, was to be designed and constructed for continuous service, and was to allow for convenient servicing and repairs.

The purchase order specified a delivery date of February 1, 1983. I.E.M. was to test the machine at its facility prior to delivery. Chromalox was to pay I.E.M. fifty percent of the contract amount upon satisfactory completion of the machine, with the remainder due within thirty days.

I.E.M. did not begin production of the machine until after December 7, 1982, when Chromalox sent required documentation regarding some of the specifications. About this time, Blackett became aware that the previously eliminated washer orienting device might be necessary to duplicate the manufacturing process. He discussed the problem with Irey, who told him that it would not be any problem to put a little orienter mechanism on the machine. They did not discuss any price increase or extension of the delivery date for the machine.

On March 31, 1983, approximately sixteen weeks later, Irey delivered the uncompleted machine to Chromalox's facility at Blackett's request, because Blackett needed to demonstrate it to "corporate people" from Emerson Electric. Irey indicated that it would take two to three weeks to complete the machine, but that it was to the point that he could complete it at Chromalox's plant. Because of its uncompleted condition, Chromalox did not pay for the machine at this time.

However, by April 1983, the machine was still not producing heating coil assemblies, and had numerous problems. First, the parties finally determined that addition of the washer orienter was necessary. Second, the washer dispenser on the machine continually jammed. Although Chromalox suggests that this problem was the result of Irey's poor design, Irey indicated that the washers supplied by Chromalox may have caused much of the problem: He stated that it is understood in the automation industry that you will get washers free from burrs, deformations, and dirt because an automated machine cannot handle nonidentical parts. Even though Chromalox's specifications stated that the washers used for production by the machine would be flat and free from burrs, they were not. Instead, they were nonidentical in shape and were mixed with bits of rock left from Chromalox's deburring operation. Consequently, Irey maintained that the problems encountered with the washer dispenser were a result of the poor quality of the washers. Finally, Irey and Chromalox engineers determined that it would be necessary to add a previously uncontemplated coil centering device to the machine. In its initial specifications, Chromalox had represented that the coils used on the machine would be manufactured to within plus or minus one coil diameter in length. However, the coils provided by Chromalox did not conform to this standard. According to

Irey, the coil centering device was a necessary modification to compensate for Chromalox's lack of quality control, but interfered with the operation of the rest of the machine.

During the ensuing year, Irey continued to work part time, together with Chromalox engineers, on the machine at the Chromalox plant. He spent a considerable amount of time on two unsuccessful attempts to design and install the washer orienter while Chromalox engineers constantly changed the specifications for the machine.

Although the machine was not operational during this period, never producing more than ten or twelve coil assemblies at a time, Chromalox paid Irey the total contract amount for the machine by October 4, 1983 because Irey was facing extreme financial pressures. Blackett told Irey that if the machine worked, Chromalox would be willing to pay I.E.M. an additional $30,000 for the design and engineering package as an attempt to compensate him for the additional engineering work.

On March 26, 1984, Blackett authorized the machine's return to I.E.M.'s facility in Salt Lake City for the purpose of refining the washer feeder and finding a way to orient the washers. During the ensuing ninety days, Irey again redesigned the washer orienter. However, the machine developed additional problems related to the washer feeder and washer orienter.

Irey returned the machine to Chromalox in June 1984, representing that it would produce about 250 parts per hour and that Chromalox could start training an operator. However, the machine continually jammed after producing only a few parts. Nevertheless, Chromalox trained two operators. One of them, Carolyn Cromwell, stated that she operated the machine on and off for about two months, that the machine only produced twenty-five coils per hour and seven coils in one sequence, and that it was always jamming and was under repair more than it was operational.

In October 1984, the parties decided to further modify the machine by adding another operation, cutting off the "pigtail" hook on the heating coils, which required the machine's return to I.E.M.'s facility. Blackett told Irey that he did not care what Irey did to the machine but that it had to produce 400 parts per hour to be acceptable, and claimed that this request was simply for a modification of Irey's design, not a modification of the original specification.

The transfer order authorizing the machine's return to I.E.M., dated November 1, 1984, indicated that there was to be no charge for this work. Irey, however, testified that he had not seen or agreed to this order prior to the trial. On November 5, 1984, Chromalox shipped the machine to I.E.M.'s facility by common carrier. Because of Chromalox's admitted negligence, the machine was damaged during shipping. Robert Slater, a senior Chromalox engineer, went to I.E.M.'s facility, verified the damage, and authorized Irey to repair the damage and bill Chromalox for the $1,500 repair cost. Chromalox never paid for this repair, although Blackett alleges that he deducted it from expenses which Chromalox had incurred on Irey's behalf. Because Irey understood, from Blackett's comments, that he was to "go ahead" with the machine, he designed, extensively tested, and debugged a fourth washer orienter and installed it on the machine. Having done this, he videotaped the machine operating at the rate of 500 coil assemblies per hour, and with the assistance of his consulting engineer, ran timing tests which came out at 7.14 seconds per cycle, a rate of about 505 parts per hour.

In March or April 1985, Irey arranged for Chromalox representatives to come to the I.E.M. facility for a demonstration of the machine. Irey requested that they bring new coils for the demonstration because the old coils were bent and damaged from repeated testing. Chromalox representatives, however, forgot to bring the new coils, so Irey was forced to use the old, damaged ones for the demonstration. Consequently, the machine malfunctioned during the demonstration. However, one Chromalox representative, Slater, indicated that he watched the machine, which had undergone considerable changes, operate through its cycle for about ten minutes with the reclaimed coils, and stated that it "looked excellent." He observed that the machine could be run at 400 parts per hour, but was unable to run 400 parts because Irey had insufficient coils to do so. He also testified that the additional parts put on the machine at Chromalox's request slowed it down, and that he was expecting to pay approximately $10,000 for the modifications to the machine. Blackett, however, stated that the machine would only cycle at a rate of 287 parts per hour and would break down after several minutes of operation.

Irey asserts that the changes and modifications Chromalox requested after March 31, 1983 required additional engineering and materials valued at $185,817. He states that this amount represents nothing but modifications, and he had subtracted out expenses for which he felt responsible. After the demonstration, Irey was willing to settle with Blackett for $52,000 for these

changes, and demanded payment. In response, Blackett told Irey that Chromalox would not pay any more for the machine, that Chromalox owned it, and that Chromalox representatives would come and pick it up. He testified that Irey never billed him for the alleged modifications and that the only modification he requested was the washer centering device. He further alleged that Chromalox never accepted the machine as completed because it never functioned according to the specifications; that Chromalox had provided Irey with sufficient coils, washers, and bolts to complete and demonstrate the machine; and that Chromalox had paid Irey in full for the machine. Irey asserted a lien against the machine to secure payment of the amounts he claimed, and kept the machine.

On April 25, 1985, Chromalox sued respondents, requesting a writ of attachment on the machine. The court granted Chromalox's writ, and ordered that the machine should be taken from I.E.M.'s facility and stored in a storage unit under the control of the Salt Lake County sheriff. Respondents moved to quash the writ and answered Chromalox's complaint. On November 6, 1985, Chromalox filed an amended complaint, requesting the return of the machine, $81,868.87 in damages, reasonable attorney fees and costs, and $20,000 in punitive damages. Respondents asserted a counterclaim, demanding $186,817 in damages.

On February 5, 1986, Chromalox moved for summary judgment, raising the issue that Irey was prevented from seeking relief through Utah courts, pursuant to Utah Code Ann. § 58-22-20 (1963), because he was not authorized to practice as an engineer. Irey opposed the motion, indicating that Joseph Lindsey, a licensed professional engineer, had been on I.E.M.'s staff at all relevant times, and that Robert Griffin, also a licensed professional engineer, had done engineering work on the machine. The court denied Chromalox's motion.

A jury trial was held on November 17, 1987. The jury found in favor of Irey and awarded him damages against Chromalox of $92,500, accrued interest of $24,281, and costs of $649.75. On January 15, 1988, the trial court amended the judgment, awarding Irey $92,500, $23,895.91 in accrued interest, $285.45 in costs, and awarded possession of the machine to Chromalox. Chromalox brought this appeal.

The parties raise the following issues on appeal: (1) May respondents recover for breach of contract, given the engineering licensing provisions of Utah Code Ann. § 58-22-20 (1963); and (2) did the trial court commit reversible error by refusing to give Chromalox's requested jury instruction on breach of warranty?

I.

ENGINEERING LICENSE

The major issue raised by the parties is whether, under the relevant provisions of the Engineers' and Surveyors' Licensing Act, Utah Code Ann. § 58-22-1 to -25 (1963), respondents may recover for breach of contract.

Chromalox argues that section 58-22-20 bars I.E.M. from seeking any relief through the courts because I.E.M., through Irey, practiced engineering in the state of Utah without a license. I.E.M., however, argues that it is not precluded from enforcing its contract because: (1) Chromalox is not a member of the protected class, the lay public, but rather, Chromalox is an industrial manufacturer which sells only to industrial and commercial users; (2) Irey believed that he was acting in compliance with the statute by hiring licensed engineers to work on the Chromalox project; and (3) there is evidence upon which the jury could reasonably conclude that the machine worked.

At the outset, we note that the record clearly indicates Irey practiced engineering in the state of Utah without a license. Relevant provisions of Utah Code Ann. § 58-22-2 (1963) define the practice of engineering as:

> the performance of any professional service or creative work requiring engineering education, training and experience, and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with the utilization of the forces, energies, and materials of nature in the development, production, and functioning of engineering processes, apparatus, machines, equipment, . . . employed in or devoted to public or private enterprise or uses.

Similarly, the term "practice of engineering" "comprehends the practice of those branches of engineering, the pursuit of any of which affects the safety of life, health or property, or the

public welfare." Utah Code Ann. § 58-22-2 (1963). By designing and constructing the machine, Irey unquestionably engaged in creative work and professional services requiring application of the physical and engineering sciences. It is undisputed, also, that Irey was not licensed according to the terms of the statute. He held no other engineering license or college degree, and had not engaged in any formal engineering education.

Section 58-22-2 further states that:

> [a] person shall be construed to practice or offer to practice engineering, within the meaning and intent of this act, . . . who holds himself out as able to perform, or who does perform any engineering service or work or any other professional service designated by the practitioner or recognized by educational authorities as engineering.

The evidence on the record warrants the inference that Irey held himself out as being able to perform certain engineering services, so, under this provision, he should be construed to have practiced engineering during the relevant times.

Utah Code Ann. § 58-22-21 (1963) lists the circumstances under which a practitioner might be exempted from the licensing requirement. The only arguably applicable exemption to the licensing requirement is contained in section 58-22-21(d), which states:

> This act shall not be construed to prevent or apply to . . . The work of an employee or a subordinate of a person holding a certificate of registration under this act, or an employee of a person exempted from registration by this section; provided such work does not include responsible charge of design or supervision . . . .

The facts clearly establish that Irey was not merely an employee or subordinate of Lindsey, but that they collaborated on an equal basis, and that Irey had primary responsibility for design and manufacturing of the machine. Thus, this section is not applicable, and Irey is not exempt from the licensing requirement.

Because Irey practiced engineering as defined by the Act and is not exempted from its provisions, he comes under its provisions, including section 58-22-20 which states, in relevant part, that:

> [n]o person shall bring or maintain any action in the courts of this state for enforcement of any contract or the recovery of any sums due in connection with the practice of engineering or land surveying in this state as defined herein, without alleging and proving that he was duly authorized to practice under the provisions of this act . . . .[1]

There is no Utah case law specifically interpreting this provision or other, similar provisions. However, the Utah Supreme Court has stated, regarding the status of unlicensed practitioners, that:

> [i]f the purpose of licensing is to protect the public, then the general rule in this State is that the party who does not obtain a license, but is required to do so, cannot obtain relief to enforce the terms of his contract -- including payment thereunder -- even though there are other penalties imposed against him expressly by statute including criminal sanctions.

George v. Oren Ltd. & Assocs., 672 P.2d 732, 735 (Utah 1983) (quoting Fillmore Prods., Inc. v. Western States Paving, Inc., 561 P.2d 687, 689 (Utah 1977)) (emphasis in original);

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1. Under the new version of the comparable statute, "[a] person who is not licensed under the provisions of this chapter may not bring or maintain any action in the courts of this state for enforcement of any contract or the recovery of any sums due in connection with the practice of engineering . . . in this state." This statute was enacted by ch. 24, 1986 Utah Laws, effective April 28, 1986, which repealed the former sections 58-22-1 to -22 as enacted by ch. 118, 1955 Utah Laws. Because the events leading to this appeal occurred from 1982 to 1985, prior to the effective date of the new statute, the old version applies.

see also Heber Valley Truck, Inc. v. Utah Coal & Energy, Inc., 611 P.2d 389, 391 (Utah 1980); Mosley v. Johnson, 22 Utah 2d 348, 453 P.2d 149, 152 (1969); Smith v. American Packing & Provision Co., 102 Utah 351, 130 P.2d 951, 957 (1942). This general rule was adopted in connection with licensing statutes which did not specifically provide, as does section 58-22-20, that an unlicensed practitioner cannot maintain an action in the state's courts to enforce the terms of his contracts. See e.g., Loader v. Scott Constr. Corp., 681 P.2d 1227, 1229 (Utah 1984). Because section 58-22-20 only states explicitly what the general rule has been held to be, we interpret the statute consistently with the case law which has developed under the general rule.

The general rule is not applied unconditionally, but only under circumstances in which the "party from whom the contractor seeks to recover is in the class the legislature intended to protect." Lignell v. Berg, 593 P.2d 800, 805 (Utah 1979); see also George, 672 P.2d at 735; Heber Valley Truck, Inc., 611 P.2d at 391. The purpose behind taking this approach is to avoid unreasonable penalties and forfeitures which go, not to the state, but to repudiating defendants. Fillmore Prods., Inc. v. Western States Paving, Inc., 561 P.2d 687, 689 (Utah 1977); see also Loader, 681 P.2d at 1229; Heber Valley Truck, Inc., 611 P.2d at 391; Lignell, 593 P.2d at 805. Laws intended for protecting the public are not intended to become "an unwarranted shield for the avoidance of a just obligation," Fillmore Prods., 561 P.2d at 690 (quoting Matchett v. Gould, 131 Cal. App. 2d 821, 281 P.2d 524 (1955)) and should not allow a "defendant to take the benefit of an unlicensed plaintiff's labor and refuse to pay for it." Heber Valley Truck, Inc., 611 P.2d at 391.

"A litigant is not a member of [the class the legislature intended to protect] if the required protection . . . is in fact afforded by another means," Lignell, 593 P.2d at 805, such as the litigant being licensed in the same trade or profession as the unlicensed practitioner. See e.g., Heber Valley Truck, Inc., 611 P.2d at 391-92; Lignell, 592 P.2d at 805; Fillmore Prods., 561 P.2d at 689. In Fillmore Products, a licensed contractor who contracted for services with an unlicensed contractor was not allowed to invoke the general rule prohibiting the unlicensed contractor from initiating an action for payment because the unlicensed contractor's work had met all the requirements and specifications of the general contract and the entire project was under the supervision of a licensed project engineer. Fillmore Prods., 561 P.2d at 689; see also Heber Valley Truck, Inc., 611 P.2d at 391-92. In Loader v.

Scott Construction Corp., the Utah Supreme Court found that the defendant from whom the unlicensed contractor demanded payment was a licensed contractor, so did not belong to the class of persons the general rule was intended to protect, the lay public, because he was presumed to possess expertise in the contracting business which would enable him to protect himself. Loader, 681 P.2d at 1229. Significantly, the defendant did not complain at trial that the unlicensed contractor's work was unsatisfactory, so the court assumed that the contractor's performance met the defendant's expectations. Id. Ultimately, the court found in favor of the unlicensed contractor because (1) the defendant was not a member of the class the statute was intended to protect, (2) the unlicensed contractor fully performed the contract and the defendant would be unfairly benefitted by avoiding payment, and (3) the unlicensed contractor's unlicensed status was the result of a good faith mistake. Id. at 1230.

This court will reverse a judgment based upon a jury verdict only if, "viewing the evidence in the light most favorable to the verdict, there is no substantial evidence to support it." Canyon Country Store v. Bracey, 781 P.2d 414, 417 (Utah 1989) (quoting In re Estate of Kesler, 702 P.2d 86, 88 (Utah 1985)). Where there is conflicting evidence, "we assume that the jury believed those facts that support its verdict . . ., and we view the facts and the reasonable inferences that arise from those facts in a light most supportive of the jury's verdict." Canyon Country Store, 781 P.2d at 417 (quoting Bennion v. LeGrand Johnson Constr. Co., 701 P.2d 1078, 1082 (Utah 1985)).

In the present case, the Chromalox employees involved with the project were either licensed engineers or working under the direction of licensed engineers. Ned Blackett was a licensed engineer, as was Charles Ashburn, a manufacturing engineer who assisted Irey with design. Mark Coy, the primary Chromalox engineer on the project, was an engineering student working under Blackett's direction. Under Loader, Chromalox is, thus, presumed to possess expertise in engineering so "is not in need of the protection the licensing statute was intended to provide to the lay public." Loader, 681 P.2d at 1229.[2]

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2. Although the focus under Loader is solely on whether the party refusing payment has the very expertise which the

Although substantially controverted, the record further contains evidence from which the jury could conclude that the machine worked according to the required specifications as revised by Chromalox.[3] Likewise, although Irey was not in compliance with the licensing statute, the record contains evidence from which the jury could conclude that Irey was engaged in a good faith effort to comply with the statute. See footnote 2.

(footnote 2 continued)
licensing statute is designed to insure, we note that the possibility of any actual harm in this case was also greatly minimized by the availability of engineering expertise to Irey. In addition to Chromalox's in-house expertise, several registered engineers worked on, approved, and certified the project design for I.E.M. Joseph W. Lindsey, a licensed engineer, regularly consulted with I.E.M. on various projects, including Chromalox's machine, prior to and during the manufacturing stages. He routinely reviewed Irey's designs and suggested whatever modifications he felt were required to make better use of the materials or to strengthen the machine. Although Lindsey was not an officer or employee of I.E.M., he was a stockholder, and was involved with the Chromalox project at virtually every step, spending about 140 hours on it. He worked on the preliminary design, the design of the frame, and the running of tests and analyses on the machine to assure that it was sound. He certified the machine design and contracted to have the machine built in his machine shop. Irey also employed Robert M. Griffin, a registered professional engineer, to perform computations and stress analyses on the machine. Griffin testified that Irey's design was more than adequate and was capable of operating safely and reliably from a mechanical standpoint. Irey additionally engaged Robert Kirk, also a registered engineer, to design the computer and software packages.

3. We note here that

> [t]he question on appeal from a judgment based on a jury verdict is not whether there is substantial evidence which would have supported a contrary verdict, or even whether this Court, had it been trier of fact, would have reached the same verdict as that reached by the jury. Rather, the issue is whether the jury's findings are supported by substantial competent evidence.

Canyon Country Store, 781 P.2d at 418 (quoting In re Estate of Kesler, 702 P.2d 86, 95 (Utah 1985)).

We conclude that Chromalox is not a member of the legislatively protected class and that, under these facts, preventing Irey from bringing his action against Chromalox would result in an unreasonable forfeiture. We, therefore, find that I.E.M. may recover for breach of contract under the provisions of section 58-22-20, and affirm the trial court's judgment.

II. Jury Instructions

Chromalox demands reversal of the jury verdict, alleging that the trial court committed prejudicial error by excluding its requested breach of warranty instruction.

Chromalox's attorney submitted the following jury instruction, which the trial court declined to give:

> Under the written agreement entered into on November 2, 1982, the defendant specifically agreed to produce a machine for $69,896.00 plus sales tax, which would produce 400 accepted bolt to coil terminals of diameter .06 to .115", coil length of 2" to 48," [sic] from wire gauges from 20 to 32, continuous service, convenient servicing and adjustment and/or replacing of components. This agreement warrants and binds the defendant to make a machine which would accomplish these specific functions.
>
> In the event the defendant failed to produce a machine which would specifically meet each of the functions successfully, he would be in breach of his promise or warranty and the plaintiff would be entitled to its damages.

Instead, the trial court gave the following instruction, in relevant part:

> The plaintiff alleges defendant made them a written offer to build the plaintiff a machine that would do specific

> things in a set time frame. The plaintiff further alleges that the plaintiff accepted the written offer in writing and has, in fact, paid in full for the machine. The plaintiff alleges that defendant has had more time than a reasonable time to perform, and that the plaintiffs now have the machine and it is not as ordered and is in fact worthless. Plaintiffs therefore claim that they are entitled to have their monies returned plus damages they have suffered because of the breach of contract. The plaintiff further alleges that even if the jury were to find it to be a fact (which plaintiff denies) that plaintiff; [sic] damaged the machine, requested additional features be placed on the machine, or requested a machine that would handle previously unanticipated imperfections in the coils and washers, that the defendant has still had adequate time in which to perform; and that they are therefore entitled to most of their money back, as well as damages for breach of contract.

The remainder of this instruction set forth I.E.M.'s theory of the case and submitted the allegations of fact to the jury for its determination. Subsequent to the trial court's charge to the jury, Chromalox's counsel objected to the trial court's failure to give its requested instruction, stating:

> One of our causes of action is for breach of warranty. There's no instruction in here concerning breach of warranty for the jury to rule on. So we except to it, the lacking of this instruction. We submitted one to the court on breach of warranty.

The court allowed Chromalox's exception, but stated that it would go with the instructions as outlined because it believed that "comment on some specific items would--that are requested would actually constitute a comment on the evidence. The court believes these matters are open to argument."

It is the trial court's duty to cover both parties' theories and points of law in giving jury instructions, provided that there is competent evidence to support them. Power v. Gene's Bldg. Materials, Inc., 567 P.2d 174, 176 (Utah 1977); Black v. McKnight, 562 P.2d 621, 622 (Utah 1977); Newsom v. Gold Cross Serv., Inc., 779 P.2d 692, 694 (Utah Ct. App. 1989). However, the trial court may properly refuse to give instructions if they do not accurately reflect the law governing the factual situation of the case, Black, 562 P.2d at 622, or if they tend to mislead the jury to the prejudice of the complaining party or erroneously advise on the law. See Mikkelson v. Haslam, 764 P.2d 1384, 1387 (Utah Ct. App. 1988).

Upon review of the record and Chromalox's requested instruction, we agree with the trial court. The requested instruction set forth as fact two controverted issues: that defendants had actually and specifically agreed to the terms set forth in the instruction, which corresponded with the original purchase order rather than the alleged changes which evolved over the course of production of the machine; and that defendants had not successfully produced the machine. Because the instruction implied that these issues had already been decided, we find that the court appropriately exercised its discretion because the instruction could have misled the jury to respondents' prejudice. We, therefore, find Chromalox's argument to be without merit.

The judgment is affirmed.

Regnal W. Garff, Judge

WE CONCUR:

Russell W. Bench, Judge

Gregory K. Orme, Judge